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Real Property Attachment—Property or Economic Interest?—Hansen v. Weyerhaeuser Co. (In re Northwest Homes, Inc.), 526 F.2d 505 (9th Cir. 1975), cert. denied, 425 U.S. 907 (1976)

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REAL PROPERTY ATTACHMENT—PROPERTY OR ECONOMIC INTEREST?—*Hansen v. Weyerhaeuser Co. (In re Northwest Homes, Inc.)*, 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

In late 1971 the Weyerhaeuser Company initiated a lawsuit against Northwest Homes of Chehalis, Inc., for goods sold and delivered. To ensure satisfaction of any subsequent judgment, Weyerhaeuser obtained liens against the defendant's real property pursuant to the Washington attachment statute.[1] Northwest Homes received neither notice nor an opportunity to be heard prior to the attachment.[2] Hansen, appointed receiver in Northwest's subsequent bankruptcy, applied for an order invalidating the attachment. In December 1972 the referee declared the Washington attachment statute unconstitutional under the due process clause of the fourteenth amendment to the United States Constitution and under article I, section 3, of the Washington Constitution, for failure to provide the defendant with notice and an opportunity to be heard prior to issuance of the writ.[3] On appeal, the federal district court adopted the memorandum opinion of the referee.[4]

The Court of Appeals for the Ninth Circuit reversed. *Held:* The nonpossessory lien did "nothing more than impinge upon economic interests of the property owner,"[5] and therefore the attachment statute, as applied, did not deprive the defendant of a property interest in

1. WASH. REV. CODE ch. 7.12 (1976). Weyerhaeuser apparently complied with all statutory requirements for valid attachment, as Northwest Homes never challenged it on grounds of noncompliance.

2. The attachment statute does not require that the defendant-debtor be notified or be permitted an opportunity to be heard prior to attachment of the property. *See id.*

3. The memorandum opinion of the referee is repeated in full in the district court opinion. *See In re* Northwest Homes, Inc., 363 F. Supp. 725 (W.D. Wash. 1973). The referee based his conclusion under the federal constitution on Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972). *See* text accompanying notes 23–26 *infra*.

The attachment procedures were also held invalid under article I, section 3, of the Washington Constitution, the language of which duplicates the federal due process clause: "No person shall be deprived of life, liberty, or property, without due process of law." The referee relied upon Lucas v. Stapp, 6 Wn. App. 971, 497 P.2d 250 (1972) (prejudgment seizure presented commonplace rather than "extraordinary" situation, so that summary seizure was not justified), and Seattle Credit Bureau v. Hibbitt, 7 Wn. App. 219, 499 P.2d 92 (1972) (following *Lucas*).

4. *In re* Northwest Homes, Inc., 363 F. Supp. 725 (W.D. Wash. 1973).

5. Hansen v. Weyerhaeuser Co. (*In re* Northwest Homes, Inc.), 526 F.2d 505, 506 (9th Cir. 1975) (quoting Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997, 999 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974)).

violation of due process. Further, the court found that the defendant's due process rights were fully satisfied by the statutory post-attachment hearing at which the creditor would be required to demonstrate that the writ was properly and regularly issued.[6] *Hansen v. Weyerhaeuser Co. (In re Northwest Homes, Inc.)*, 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

Since the landmark decision of the Supreme Court in *Sniadach v. Family Finance Corp.*,[7] summary prejudgment creditor remedies[8] have been subjected to increasing constitutional scrutiny. *Sniadach* and its progeny have established that the temporary seizure of a debtor's personal property by provisional writ constitutes a taking of a protected property interest under the due process clause, thus entitling the debtor to notice and an opportunity to be heard or other procedural safeguards against mistaken deprivation. This note examines the cursory reasoning in the *Hansen* decision that these procedural guarantees do not apply to the attachment of real property because such attachment affects only economic interests of the debtor rather than property interests protected by the due process clause. It also critically discusses the court's conclusion that the post-attachment hearing provided by the Washington attachment statute compares favorably with the statutory postseizure hearing that the United States Supreme Court sustained in *Mitchell v. W.T. Grant Co.*[9] The note concludes that the Washington attachment statute fails to meet the minimal due process guarantees endorsed in *Mitchell*, which—if applied to real property attachment—would minimize the possibility of mistaken or arbitrary attachment without defeating the interest of the creditor in the property attached.

I. THE REQUIREMENTS OF DUE PROCESS IN PREJUDGMENT ATTACHMENT PROCEEDINGS

A. An Overview of Procedural Due Process and Property Rights

The constitutional guarantee of procedural due process applies to

6. *See* WASH. REV. CODE § 7.12.270 (1976).
7. 395 U.S. 337 (1969).
8. "Summary" and "ex parte" are used herein to mean procedures initiated without notice and a prior hearing of the type required by Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972). *See* Part I-A *infra*.
9. 416 U.S. 600 (1974).

governmental deprivation of life, liberty, or property. It requires that any deprivation of a protected property interest be accompanied by minimum procedural safeguards, including some form of notice and hearing.[10] Once the existence of a property interest is established, courts traditionally utilize a balancing approach to the due process issue, weighing the government's interest in summary procedures against the individual's interest in procedural guarantees against mistaken or arbitrary deprivation.[11] If the individual's interest is deemed paramount, he or she must be accorded procedural guarantees—usually timely and adequate notice of the action and an effective chance for defense—before any "taking" of the property in question.[12]

10. *See, e.g.,* Bell v. Burson, 402 U.S. 535 (1971) (driver entitled to notice and hearing before revocation of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients have property interest in welfare benefits entitling them to notice and hearing before benefit termination); Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1863) (nonresident creditor with protected property interest in results of bankruptcy proceeding not bound by discharge in bankruptcy under state law when he had neither been notified nor participated in the proceeding). The theory is that no state action should work to the detriment of an individual's interest in life, liberty, or property without giving the individual notice and an opportunity to be heard. Essential to any legal system that stresses resolution of disputes through advocacy is a fair, full, and open contest between the adversaries. Contrary to those interests is any state action involving the determination of a protected interest in an ex parte proceeding. *See* Newton, *Fuentes "Repossessed" Reconsidered,* 28 BAYLOR L. REV. 497, 503 (1976).

11. Justice Frankfurter, concurring in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), outlined a number of considerations relevant to the due process balancing test:

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Id. at 163. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court balanced the recipient's interest in retaining necessary welfare benefits against the government's interest in summary termination to avoid revenue loss to ineligible recipients and sustained the private interest. In Bell v. Burson, 402 U.S. 535 (1971), the Court found that the private interest of a driver in preventing summary revocation of his driver's license outweighs the competing state interest in protecting a claimant from the possibility of an unrecoverable judgment.

Where it has been essential to satisfy state needs immediately, postponement of notice and hearing until after the taking of the property has not been considered a denial of due process. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (summary seizure of misbranded articles permissible); Phillips v. Commissioner, 283 U.S. 589 (1931) (notice and hearing postponed to ensure prompt collection of internal revenue).

12. *See* Bell v. Burson, 402 U.S. 535 (1971) (revocation of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) (imposing liability on stockholders for unpaid stock subscription held by them); Windsor v. McVeigh, 93 U.S. 274 (1876) (encumbering title to real property). Although an individual may be entitled to procedural guarantees, the form of these guarantees varies with the nature of the interests

B. *Due Process and Prejudgment Attachment of Personal Property*

Attachment is a provisional remedy,[13] ancillary to the main action in which the creditor tries to establish a claim against the debtor.[14] In Washington, to obtain a writ of attachment, the creditor must institute a suit seeking judgment on the underlying debt,[15] file an affidavit specifying the amount of the debt,[16] post a bond for double the amount claimed,[17] pledge that the attachment is sought in good faith,[18] and list any of ten statutory grounds for attachment.[19] A writ will then be

involved. In Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961), the Court stated that due process of law does not invariably require a hearing:

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . .
>
> . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Id. at 895.

13. A provisional remedy is generally defined as one "provided for present need or . . . to meet a particular exigency. Particularly, a temporary process available to a plaintiff in a civil action, which secures him against loss, irreparable injury, dissipation of the property, etc., while the action is pending." BLACK'S LAW DICTIONARY 1389 (4th ed. 1968). Its principal purpose is to permit seizure of a debtor's assets pending adjudication of an underlying claim. In addition to prejudgment garnishment, attachment, and replevin, most states have statutory provisions granting possessory liens to landlords, innkeepers, repairmen, warehousemen, and others, which permit them to retain goods in their custody pending payment for services rendered. *See* Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975).

14. *See generally* S. MORGANSTERN, LEGAL PROTECTION IN GARNISHMENT AND ATTACHMENT (1971). A creditor may utilize attachment for a variety of purposes, the most common of which are as follows: (1) To furnish security for the satisfaction of any judgment the creditor may obtain by preventing the debtor from evading the claim through disposition, destruction, or removal of the property; (2) to obtain leverage over the debtor so that he will be less likely to defend the principal suit; or (3) to gain quasi in rem jurisdiction over the defendant. *See* 48 WASH. L. REV. 646, 648 (1973).

15. WASH. REV. CODE § 7.12.010 (1976).

16. *Id.* § 7.12.020.

17. *Id.* § 7.12.060. *See* note 84 *infra*.

18. WASH. REV. CODE § 7.12.020 (1976).

19. *Id.* § 7.12.020. The ten grounds for attachment are as follows:

> (1) That the defendant is a foreign corporation; or
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> (2) That the defendant is not a resident of this state; or
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> (3) That the defendant conceals himself so that the ordinary process of law cannot be served upon him; or
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> (4) That the defendant has absconded or absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him; or
>
> (5) That the defendant has removed or is about to remove any of his property from this state, with intent to delay or defraud his creditors; or
>
> (6) That the defendant has assigned, secreted, or disposed of, or is about to assign,

issued directing the sheriff to seize property of the debtor.[20] Attachment in Washington is thus an entirely ex parte proceeding.[21] The creditor is not obligated to notify the debtor or to permit him or her an opportunity to challenge the validity of the writ prior to issuance.

Recently this kind of prejudgment creditor remedy has been subjected to intensive constitutional scrutiny. The Supreme Court traditionally had held that due process was satisfied if the debtor was afforded notice and an opportunity for a hearing at a trial on the merits of the underlying claim.[22] In *Sniadach v. Family Finance Corp.*,[23] however, the Supreme Court ruled that the temporary deprivation of the use and possession of wages in a garnishment action was a deprivation of a protected property interest and that due process requirements could be satisfied only by notice and an opportunity to be heard prior to the garnishment. *Sniadach* established that even a brief taking

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secrete, or dispose of, any of his property, with intent to delay or defraud his creditors; or

(7) That the defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or

(8) That the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or

(9) That the damages for which the action is brought are for injuries arising from the commission of some felony; or

(10) That the object for which the action is brought is to recover on a contract, express or implied.

Id. If these requirements are satisfied, the court clerk must issue a writ of attachment. *Id.*

20. *Id.* §§ 7.12.090, .130.

21. *See* note 8 *supra*.

22. *See* McKay v. McInnes, 279 U.S. 820 (1929) (mem.), *aff'g* 127 Me. 110, 141 A. 699 (1928). The state court held that the temporary deprivation imposed by Maine's summary attachment statute was not unconstitutional because it did not involve the taking of a property interest contemplated by the fourteenth amendment. The court stated that even if it had involved such a taking, it was not a deprivation without due process of law, "for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal." 141 A. at 702–03. The Supreme Court summarily affirmed. *See also* Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); Ownbey v. Morgan, 256 U.S. 94 (1921).

23. 395 U.S. 337 (1969). The Court recognized that summary procedures may well meet the requirements of due process in extraordinary situations, but found that the instant circumstances justified no such special protection to the state or creditor. The majority's ambiguous references to the specialized nature of property in wages, including the particular hardship imposed on debtors and the vast leverage gained by creditors, led some lower courts to conclude that *Sniadach* was limited to prejudgment seizures of wages or other "necessities." *See* Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970); Termplan Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969). *See also* 54 MINN. L. REV. 853, 860 (1970). Other courts rejected any such distinction. *See* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972); Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

or deprival of the use of property may be within the ambit of due process.[24] Three years later, the Supreme Court expanded this rule in *Fuentes v. Shevin*,[25] invalidating Pennsylvania and Florida replevin procedures for failure to afford notice and an opportunity to be heard prior to replevin of the debtor's property. The significance of *Fuentes* was that absent "extraordinary situations" the state could not participate in any prejudgment process involving the taking of an individual's property without prior notice and a hearing.[26]

Subsequently the Court in *Mitchell v. W.T. Grant Co.*[27] abandoned any absolute requirement of prior notice and an opportunity to be heard, holding as a general proposition that there must be a balancing of the conflicting debtor and creditor interests. Employing this balancing approach, the Court determined that the procedural safeguards provided by the challenged Louisiana sequestration statute complied with due process despite the absence of any provision for notice or hearing prior to issuance of the writ.[28] Most recently, in

24. Justice Harlan, in his concurring opinion, stated:

> The "property" of which petitioner has been deprived is the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as *de minimis*, she must be accorded the usual requisites of procedural due process: notice and a prior hearing.

395 U.S. at 342 (emphasis in original).

25. 407 U.S. 67 (1972).

26. *See* Newton, *supra* note 10, at 498. Under the *Fuentes* scheme, "extraordinary situations" justify summary procedures only if (1) an important governmental or general public interest is at stake, (2) there is a special need for very prompt action, and (3) the state exerts strict control over its use of legitimate force. 407 U.S. at 91. The purpose of the "extraordinary situations" exception was to confine summary seizure to a fairly narrow realm. "[The] exception was couched in terms that placed the burden on the government or the creditor to demonstrate the necessity for bypassing the ordinary due process guarantees of prior notice and a hearing." Pearson, *Due Process and the Debtor: The Impact of* Mitchell v. W.T. Grant (pt. 1), 28 OKLA. L. REV. 743, 751 (1975).

27. 416 U.S. 600 (1974).

28. Justice White, in his majority opinion, pointed out that the requirements of due process "'are not technical'" and do not guarantee any "'particular form of procedure.'" *Id.* at 610 (quoting Inland Empire Council v. Millis, 325 U.S. 697 (1945)). The Louisiana sequestration statute imposed a lien on personal property purchased on an installment contract. That lien could be defeated by the buyer's subsequent transfer of possession of the property. Thus, the *Mitchell* opinion posed the issue in terms of two parties with concurrent interests where the failure of the state to act might result in loss of the creditor's interest. This characterization suggests that the failure of the state to act might itself result in a type of due process deprivation. *See* Newton, *supra* note 10, at 504.

The Court gave the following five justifications for postponing the debtor's opportunity for a hearing: (1) The need to protect the seller's security interest in view of the steadily decreasing value of the property while in the buyer's possession; (2) the possibility that the debtor might conceal, alienate, destroy, or otherwise abrogate the

North Georgia Finishing, Inc. v. Di-Chem, Inc.[29] the Court applied the *Mitchell* analysis to invalidate Georgia's garnishment statute. Because the official seizures were carried out without prior notice, opportunity for a hearing, or other procedural guarantees against mistaken deprivation, the Court concluded that they failed to satisfy due process.[30]

Accordingly, the Supreme Court has clearly abandoned the traditional rule permitting ex parte seizure of personal property. *Sniadach* and its progeny established that statutes authorizing prejudgment seizure which afford neither prior notice and a hearing nor satisfactory alternatives fail to meet the minimum requisites of the fourteenth amendment.[31]

C. *Due Process and Prejudgment Attachment of Real Property*

A creditor who undertakes to attach realty must comply with the same procedures that are applicable to personalty.[32] Real property is

seller's interest; (3) the reliability of an ex parte determination when issues are capable of documentary proof; (4) the due process requirement that the conflicting interests of the creditor and debtor be balanced; and (5) the ability to have an immediate full hearing on the matter of possession following execution of the writ. 416 U.S. at 607–10. For further discussion of the *Mitchell* doctrine, see Part III *infra*.

29. 419 U.S. 601 (1975).

30. The Court noted the following three particular ways in which the garnishment statute failed to meet the due process requirements of *Mitchell:* (1) A clerk rather than a judge supervised the writ-issuing process; (2) the postseizure hearing was inadequate as it did not reach the merits of the creditor's underlying claim; and (3) the creditor was required to document the indebtedness in a merely conclusory fashion. *Id.* at 607.

31. Since *Sniadach* the Washington courts have been confronted with several cases challenging the state's summary attachment and garnishment provisions on due process grounds. In Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wn. 2d 418, 511 P.2d 1002 (1973), the supreme court read *Fuentes* broadly and held that a bank account is a significant property interest that cannot be garnished without the due process guarantees of prior notice and an opportunity to be heard. The court stated that the business background of the debtor was pertinent only to questions of waiver or the form of the hearing, not the right of the debtor to the hearing itself. In Rogoski v. Hammond, 9 Wn. App. 500, 513 P.2d 285 (1973), the plaintiff-landlord brought an action for unpaid rent and obtained an order directing the tenant to show cause why a writ of attachment should not issue. The court held that the attachment of personal property must be preceded by adequate notice and hearing. After extensive discussion of the nature and content of any preseizure hearing, the court concluded that the show cause proceeding in the instant case failed to meet the necessary requirements. In Lucas v. Stapp, 6 Wn. App. 971, 497 P.2d 250 (1972), the court of appeals held an attachment of personalty without prior notice and hearing to be unconstitutional under *Sniadach*. *Accord,* Seattle Credit Bureau v. Hibbitt, 7 Wn. App. 219, 499 P.2d 92 (1972) (relying on *Fuentes*). All of these decisions preceded *Mitchell*.

32. *See generally* WASH. REV. CODE ch. 7.12 (1976).

not attached by seizure, however, but by filing with the county auditor a copy of the writ together with a description of the property attached.[33] The attachment operates as a lien preventing the property owner from conveying clear title. It puts any potential purchaser on notice and preserves the creditor's right to have the real estate sold in execution as against any subsequent taker.[34] The attachment remains a cloud on the debtor's title until discharge of the debt, his success on the merits, or judicial satisfaction of the creditor's claim.[35]

Because the Court's decisions from *Sniadach* to *Di-Chem* involved the summary seizure of personal property, lower courts confronted with a due process challenge to summary procedures involving *real property* have encountered a threshold question: Although the debtor is not deprived of "possession" of the attached real estate, does the lien nevertheless deprive the debtor of a property interest protected by the fourteenth amendment?

Although the Supreme Court has not directly addressed this issue, it has indicated that a "property interest" should be broadly construed in the context of prejudgment creditor remedies. Justice Harlan, concurring in *Sniadach,* stated that due process protections apply to an interference with the "unrestricted use" of the property as well as with possession.[36] In *Fuentes* the Court refused to confine the scope of *Sniadach* and extended due process guarantees to all forms of chattel property without respect to distinctions based on type, use, hardship, or length of deprivation.[37] The relative weight of the property interest

33. *See id.* § 7.12.130.

34. *See id.* §§ 7.12.170, .210. *Cf.* Zittman v. McGrath, 341 U.S. 446 (1952) (personal property).

35. For the manner in which the sheriff must dispose of the attached property to satisfy the underlying judgment, see WASH. REV. CODE § 7.12.210 (1976). At any time prior to judgment on the underlying suit, the defendant may post bond to the plaintiff to the effect that he will perform the judgment of the court, and the attachment will be discharged. *Id.* § 7.12.250. The defendant may also move to have the writ dissolved on grounds that it was improperly or irregularly issued. *Id.* § 7.12.270. For discussion of this post-attachment hearing provision, see Part III–A *infra.*

36. "[D]ue process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property *or its unrestricted use.*" 395 U.S. at 343 (Harlan, J., concurring) (former emphasis in original; latter emphasis added).

37. The Court stated: "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property." 407 U.S. at 86. The Court also noted:

> No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process

has been deemed relevant to the form of notice and hearing accorded, but not decisive of the basic right to due process protection.[38] Finally the Court in *Di-Chem* declined to limit its definition of protected property interests, eschewing any constitutional distinction between commercial and consumer garnishment.[39]

Relying upon the Court's expansive definition of "property," a number of lower courts have found that the lien imposed by real property attachment constitutes a taking of a protected property interest cognizable under the due process clause.[40] These courts have refused to hold that an actual seizure is necessary to invalidate summary attachment procedures. Other courts, focusing on the Supreme Court's emphasis on the "use and possession" of which the personal property

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is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of these choices and protect only the ones that, by its own lights, are "necessary."

Id. at 90–91.

38. *Id.* at 86, 90 n.21. The Court again indicated that outright seizure is not the only kind of deprivation that must be preceded by notice and a hearing. *Id.* at 91 n.23.

39. In refusing to make any distinction based on the status of the debtor, the Court stated: "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." 419 U.S. at 608. This view is consistent with other statements of the Court regarding the scope of the fourteenth amendment protection of "property." It is the *nature* of the property interest affected that is pertinent to due process, rather than considerations of "hardship," "necessity," or "importance." In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court stated that "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Id.* at 570–71 (emphasis in original).

40. These courts have emphasized that a real property attachment restricts sale, affects mortgage value and mortgageability, and decreases the owner's equity to the extent of the lien. *See, e.g.,* Terranova v. AVCO Financial Servs., 396 F. Supp. 1402 (D. Vt. 1975); Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., Inc., 365 F. Supp. 1299 (D. Mass. 1973); Clement v. Four North State Street Corp., 360 F. Supp. 933 (D.N.H. 1973). In each case the federal district court struck down on due process grounds a state statute permitting summary prejudgment attachment of real property.

One case challenging ex parte real property attachment on due process grounds has reached the Washington Supreme Court. In Thompson v. DeHart, 84 Wn. 2d 931, 530 P.2d 272 (1975), the court found constitutional an attachment of real property which met the three-pronged test of *Fuentes* for an "extraordinary situation." *See* note 26 *supra*. The court stated:

> First, the attachment of the real property was necessary to further an overriding state interest in protecting creditors from fraudulent or wrongful disposal of property by a debtor. Second, there was a special need for very prompt action under the circumstances of this case. Third, RCW 7.12.020(6) and (7) have been drawn to accommodate such an extraordinary situation . . . .

84 Wn. 2d at 937, 530 P.2d at 276. The court limited its holding to an attachment

debtor is deprived,[41] have concluded that the restrictions on real property use imposed by an attachment lien are de minimis, amount to little more than constructive notice that a suit for damages is pending, and accordingly do not deprive the debtor of a constitutionally protected property interest.[42]

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pursuant to R.C.W. § 7.12.020(6)–(7), two of the ten grounds for attachment. *See* note 19 *supra*. Both of these grounds concern fraudulent disposal of assets by a debtor. The court did not reach the constitutionality of an attachment under any of the other eight grounds, including R.C.W. § 7.12.020(10), which authorizes an attachment to recover on an express or implied contract. Presumably that ground, at least, would not fit within the *Fuentes* concept of an extraordinary situation.

In adopting the "extraordinary situations" rationale, the court appeared to accept the premise that an attachment of real property involves the taking of a constitutionally protected property interest. Under *Fuentes*, the "extraordinary situation" exception was a device to permit summary seizure of *protected* property in limited situations where prior notice and an opportunity to be heard would otherwise be mandated. The court indicated in dictum, however, that even absent an extraordinary situation it might consider ex parte attachment of real property constitutionally permissible. 84 Wn. 2d at 938, 530 P.2d at 276. The court purported to distinguish the case from *Fuentes* under the authority of McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), *aff'd mem.*, 279 U.S. 820 (1929). In *McKay* the Maine court held constitutional the state's summary attachment statute as applied to real property. *See* note 22 *supra*. Thus, the court in *DeHart* appears to have taken away with one hand what it gave with the other.

Nevertheless, both the extraordinary situations rationale and the dictum relying upon *McKay* are of dubious value. Although the Washington court in *DeHart* did not consider the effect of the Supreme Court's decision in *Mitchell*, the ratification therein of the procedural alternatives allowing summary sequestration appears to have destroyed the underlying basis of "extraordinary situations" as defined in *Fuentes*. *See* Pearson, *Due Process and the Debtor: The Impact of* Mitchell v. W.T. Grant (pt. 2), 29 OKLA. L. REV. 277, 309 (1976). Moreover, although it was cited with approval in *Mitchell*, 416 U.S. at 613, *McKay* is of questionable precedential value. *See* Fuentes v. Shevin, 407 U.S. at 91 n.23. When it was decided, the Court gave greater weight to long-established practices that have since been successfully challenged on due process grounds. Justice Harlan, concurring in *Sniadach*, stated that prior notice and an opportunity to be heard constitute the core principle of due process and declared himself unwilling to "take the unexplicated per curiam in *McKay v. McInnes* as vitiating or diluting" those essential elements. 395 U.S. at 343–44. A careful reading of Fuentes v. Shevin, 407 U.S. at 91 n.23, and cases cited therein suggests that the Court's memorandum opinion upholding the procedural due process of attachment of realty in *McKay* is now to be construed narrowly to allow attachment of realty only when necessary to secure jurisdiction.

41. *See* Fuentes v. Shevin, 407 U.S. 67, 86–88 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

42. *See, e.g., In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975) (mere restriction of power to alienate is not deprivation of property interest); First Recreation Corp. v. Amoroso, 26 Ariz. App. 477, 549 P.2d 257, 260 (1976) (real property attachment does not deprive debtor of "any significant property interest"). *See also* Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974) (mechanics' and materialmen's lien interferes only with "economic" interests of debtor); Central Security Nat'l Bank v. Royal Homes, Inc., 371 F. Supp. 476 (E.D. Mich. 1974); Harrison v. Morris, 370 F. Supp. 142 (D.S.C. 1974); Black Watch Farms v. Dick, 323 F. Supp. 100 (D. Conn. 1971); Robinson v. Loyola Foundation, Inc. 236 So. 2d 154 (Fla. Dist. Ct. App. 1970) (real estate attachment is little more than constructive notice that suit for damages is pending against owner).

II. *HANSEN v. WEYERHAEUSER*: "ECONOMIC INTEREST" AND REAL PROPERTY ATTACHMENT

In an extremely brief opinion, the Ninth Circuit in *Hansen v. Weyerhaeuser* held that the creditor's attachment lien interferes with only "economic" interests of the debtor and thus does not constitute the taking of a property interest within the ambit of the due process clause.[43] Consequently, neither prior notice and an opportunity to be heard nor alternative procedural guarantees are vital to a constitutional attachment of real property pursuant to the Washington statute.[44]

As the basis of its decision, the court relied upon *Spielman-Fond, Inc. v. Hanson's, Inc.*, as summarily affirmed by the Supreme Court.[45] In *Spielman-Fond* the Arizona federal district court held that a mechanics' and materialmen's lien on real property did not deprive the owner of a property interest cognizable under the fourteenth amendment. The debtor had only an "economic interest" in retaining his property free of mistaken or arbitrary liens. Absent a property interest, the summary lien procedures provided by the Arizona statute could not be unconstitutional.[46]

After determining that the debtor in *Hansen* had not been deprived of a property interest, the court concluded that it was not required to consider the balancing approach to prejudgment remedies expressed

43. 526 F.2d at 506.

44. *Id.*

45. 379 F. Supp. 997 (D. Ariz. 1973) (per curiam), *aff'd mem.*, 417 U.S. 901 (1974). The decision was summarily affirmed two weeks after *Mitchell* was decided. The Ninth Circuit court found *Spielman-Fond* closely in point, reasoning that the effect of an attachment lien on the interests of the debtor is identical to that of a mechanics' lien.

46. Spielman-Fond contended that the defendant's perfection of its mechanics' and materialmen's lien without prior notice and an opportunity to be heard deprived it of a property interest in violation of the fourteenth amendment. The court acknowledged similarities between the challenged lien procedures and the garnishment and replevin statutes in *Sniadach* and *Fuentes*. All three involved a dispute between private parties and a state mechanism as the instrumentality of one party; in addition, none of the statutes provided significant procedural safeguards against mistaken deprivation. Nevertheless, the crucial distinction remained: In both *Sniadach* and *Fuentes* the debtors were deprived of actual possession and use of their property, whereas in *Spielman-Fond* the plaintiff retained possession and continued to rent the property. Furthermore, although the lien made sale of the property more difficult, there was nothing in the statute or lien prohibiting sale if a willing buyer were found. The lien did "nothing more than impinge on economic interests of the property owner." 379 F. Supp. at 999. The court distinguished cases upon which the plaintiff relied as reaffirming the importance of the right to freely alienate property on the ground they involved actual statutory or contractual prohibitions against sale. *Id.*

in *Mitchell*.[47] The court did not discuss the due process guarantees validated in *Mitchell*, except to suggest that the post-attachment hearing provision of the Washington statute is analogous to the early postseizure hearing provided by the Louisiana sequestration statute.[48]

This part critically evaluates the authority of *Spielman-Fond* as precedent and challenges the reasoning of that decision, which was adopted in *Hansen v. Weyerhaeuser*. It demonstrates that realty attachment involves the curtailment of important property uses. It suggests that the better view is that an attachment of real property deprives the owner of a property interest protected by the procedural guarantees of the fourteenth amendment.

A. Spielman-Fond *As Precedent*

The Ninth Circuit found the summary affirmance in *Spielman-Fond* controlling.[49] But although a summary affirmance is a decision on the merits, it is not an affirmance of the *reasoning* of the lower opinion.[50] It is doubtful that the mechanics' lien involved in *Spielman-Fond* presented sufficient legal or factual similarities to real property attachment to warrant the application of that decision in the absence of a full opinion by the Supreme Court.[51]

Indeed, one court has expressly rejected both the reasoning and the precedential authority of *Spielman-Fond* while holding a mechanics' lien statute invalid on due process grounds. In *Barry Properties, Inc. v. Fick Bros. Roofing Co.*,[52] the Maryland court observed that the Supreme Court may have considered the Arizona mechanics' lien law

47. For a discussion of the balancing approach to prejudgment remedies formulated in *Mitchell*, see Part I–A *supra* & Part III *infra*.

48. 526 F.2d at 506–07. For an analysis of this phase of the decision, see Part III–A *infra*.

49. The court stated: "The [Supreme] Court has made it clear that a summary affirmance of a case within its appellate jurisdiction is a decision on the merits and is binding on the inferior federal courts until the Court tells them that it is not." 526 F.2d at 506.

50. *See* note 54 and accompanying text *infra*.

51. In the jurisdictional brief submitted by the respondent in *Spielman-Fond*, discussion centered on efforts to distinguish mechanics' liens from real property attachment. Respondents appeared to concede that summary attachment of real property would be unconstitutional. However, they distinguished mechanics' liens as analogous to a confession of judgment, citing Charleston v. Wohlgemuth, 332 F. Supp. 1175 (E.D. Pa. 1971), *aff'd*, 405 U.S. 970 (1972), and Ross v. Brown Title Co., 356 F. Supp. 595 (E.D. La.), *aff'd*, 412 U.S. 934 (1973). Motion To Dismiss or Affirm at 2–5, 9.

52. 277 Md. 15, 353 A.2d 222 (1976).

upheld in *Spielman-Fond* as containing procedural safeguards adequately comporting with due process.[53] In rejecting the authority of *Spielman-Fond* as dispositive of the issues, the court quoted Chief Justice Burger:

> When [the Supreme Court] summarily affirm[s] without opinion the judgment of a three-judge District Court [the Court] affirm[s] the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to establish.[54]

The Supreme Court in *Spielman-Fond* affirmed the *judgment* of the Arizona district court, but it did not necessarily accept the lower court's conclusion that a mechanics' lien invades only "economic" as opposed to protected property interests of the debtor. Recent lower court decisions add further support to this position.[55] In light of the Supreme Court's expansive reading of "property interest" in past decisions,[56] *Spielman-Fond* should be limited to its facts rather than extended to cases of real property attachment.

B. The Substantive Effect of Real Property Attachment

The *Hansen* court's conclusion that there was "no substantial

53. *Id.* at 233. *Accord,* Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., 168 Conn. 371, 362 A.2d 778, 783 (1975). The *Roundhouse* decision was vacated and remanded by the Supreme Court for a determination of whether the decision rested on an independent state ground, 423 U.S. 809 (1975), and the state court reaffirmed on both state and federal grounds, 365 A.2d 393 (Conn. 1976). The court in *Barry Properties* also noted the virtually identical function of the federal and state due process clauses: "[T]hese constitutional provisions have the same meaning and effect in reference to an exaction of property, and the decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities . . . ." 353 A.2d at 227 (quoting Bureau of Mines v. George's Creek, 272 Md. 143, 156, 321 A.2d 748, 755 (1974)).

54. Fusari v. Steinberg, 419 U.S. 379, 391–92 (1975) (concurring opinion) (footnote omitted). In Edelman v. Jordan, 415 U.S. 651, 670–71 (1974), the Court indicated that summary affirmances have some minimal precedential value, but failed to define that value.

55. *See* notes 70–74 and accompanying text *infra*. A number of courts, however, have adopted the "economic interest" rationale of *Spielman-Fond* in the context of both mechanics' liens and real property attachment. *See* note 69 and accompanying text *infra*.

56. *See* notes 36–39 and accompanying text *supra*.

taking of property" within the meaning of the due process clause[57] is based on an analysis which appears to concentrate on the form rather than on the substance of the deprivation. The Ninth Circuit characterization of the debtor's interest as "economic" does nothing to lessen the impact of an attachment of real property. Such an attachment has a number of negative effects: Until the underlying claim is decided on its merits, an attachment impairs market value and marketability, adversely affects credit rating, restricts the ability of the owner to mortgage the property, and diminishes his equity to the extent of the lien.[58] In addition, the lien may be used by the creditor for the sole purpose of pressuring the debtor to settle out of court and to pay a doubtful or invalid claim.[59] There is little practical difference between these restrictions and any legal or contractual prohibition against sale.[60]

Some courts have considered constitutionally significant the difference between the "hardship" imposed by actual seizure of personal property and the less immediate and noticeable effects of an attach-

57. 526 F.2d at 506.

58. *See* Connolly Dev. Inc. v. Superior Court, 17 Cal. 3d 803, 813, 553 P.2d 637, 643, 132 Cal. Rptr. 477, 483 (1976), *appeal dismissed*, 47 S. Ct. 778 (1977) (mem.); Barry Properties, Inc., v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222, 228 (1976).

59. The leverage that may be gained by the creditor when an attachment lien is filed is most apparent when the property owner is contemplating immediate sale. The lien will render title "unmarketable" and may force the owner to breach the contract of sale. The existence of title insurance will not suffice in cases where the purchase agreement or the lender's commitment requires the owner to convey marketable title; the purchaser or lender may justifiably object to a closing of escrow upon the owner's tender of only an insurable title. *See* Hebb v. Severson, 32 Wn. 2d 159, 165–67, 201 P.2d 156, 159–60 (1948). Further, title insurance may be more costly than the amount demanded in the attachment. In any case, the property owner is faced with only unattractive alternatives—pay the creditor's claim regardless of validity and discharge the attachment, risk breach of the land sale contract and consequent damages, or forego the use of other assets to invest in title insurance. *See* Comment, *Sniadach, Overmyer and Fuentes: Problems for the Mechanics' Lien and Protection of Real Property Developers*, 1973 LAW & SOC. ORD. 497, 508–10. The impact of the lien and the creditor's resulting leverage against the debtor are particularly significant when the owner is a developer who borrows funds to finance construction and either contemplates selling the property or refinancing with a long-term loan. The permanent lender will require the property to be kept free of all liens and encumbrances. If the lien is not discharged, default under a construction mortgage may result and the owner may lose everything, all on the basis of an unverified claim by the creditor. Clearly, if foreclosure is the alternative, the debtor may be very receptive to a creditor's demands regardless of validity. *Id.* at 503–04.

60. Nevertheless, in Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974), the district court relied upon this difference to distinguish prior cases that had highlighted the importance of the right to freely dispose of property. *See* note 46 *supra*.

ment lien.[61] The negative effects of a real property attachment may indeed impose less "hardship," because they usually arise only if the debtor attempts to sell or mortgage the property. The same analysis, however, applies to certain forms of personal property attachment: the negative effects of a garnished bank account, for example, arise only when the debtor attempts to turn his bank's promise into cash.[62] Nevertheless, the Supreme Court has made clear that the extent to which the attachment process engenders immediate hardship is not determinative of whether a property interest exists and thus whether due process requirements should apply.[63] In *Sniadach* the Court did not require the debtor to show that the garnishment process produced any abuse or hardship; it was satisfied that abuse was potential and occurred in some cases.[64] The Court has been concerned with the creditor's leverage and lack of accountability, not because of the type of property involved, but as a consequence of the summary procedures permitted.[65]

Indeed, an attachment lien severely infringes an important incident of property ownership—the ability of the property owner to convey or mortgage clear title. In other contexts, the Court has stated that the

61. In Central Security Nat'l Bank v. Royal Homes, Inc., 371 F. Supp. 476 (E.D. Mich. 1974), the court stated: "The absence of hardship is a relevant and material factor in weighing the interests affected by the [real property] attachment." *Id.* at 481. *See also* Black Watch Farms v. Dick, 323 F. Supp. 100 (D. Conn. 1971).

62. *See* Terranova v. AVCO Financial Servs., 396 F. Supp. 1402, 1406 (D. Vt. 1975). In *Hansen* the opinion of the bankruptcy referee recognized this similarity:

> Some argument is made of the fact that the lien by way of attachment is not possessory and therefore does not amount to a seizure. However, there is not much question but what the attachment involves significant interference by the creditor with the debtor's free use of the property. While possession is one of the incidents of ownership of real property, there are other facets which are of substantial nature; thus the attachment of real estate can restrain the owner of the subject property from transforming it into money by sale or mortgage just as surely as the owner of a garnished bank account is restrained from transferring his bank's promise into cash.

In re Northwest Homes, Inc., 363 F. Supp. 725, 730 (W.D. Wash. 1973), *rev'd sub nom.* Hansen v. Weyerhaeuser Co. (*In re* Northwest Homes, Inc.), 526 F.2d 505 (1975).

63. *See* note 39 *supra*.

64. *See* Smith, *Sniadach and Summary Procedures: The Constitution Comes to the Marketplace*, 5 IND. L.F. 300, 310 (1972).

65. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969). In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court refused to distinguish between garnishment of commercial and consumer bank accounts, declaring that "the probability of irreparable injury in the latter [commercial case] is sufficiently great so that some procedures are necessary to guard against the risk of initial error." *Id.* at 608. It is the probability of injury to the class of property owners which is constitutionally relevant, not individual hardship.

right to freely convey property is constitutionally protected.[66] The Washington Supreme Court also has emphasized that the right to dispose of property is an important protected incident of ownership.[67] Further, it is settled that there may be an unconstitutional taking of property even though there is no seizure and the owner is permitted possessory use.[68]

While a number of courts considering due process challenges to state real property attachment and mechanics' lien statutes have adopted the "economic interest" rationale of *Spielman-Fond*,[69] signifi-

66. In Buchanan v. Warley, 245 U.S. 60 (1917), the Court held unconstitutional a city ordinance mandating a block quota system which prevented a white home owner from selling his property to a black. Of "property" the Court stated: "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property." *Id.* at 62. *See also* Shelley v. Kraemer, 334 U.S. 1, 10 (1948).

67. *See* Lange v. State, 86 Wn. 2d 585, 547 P.2d 282 (1976). The plaintiff argued that "de facto" condemnation of his property had occurred prior to actual condemnation because the publicity accorded a highway project had decreased the value and marketability of the land. The court agreed: " 'Ownership' in property has long been conceived as a 'complex of rights' including the right to use and enjoy the thing owned and the right to consume, destroy or alienate the thing.' " *Id.* at 590, 547 P.2d at 285. Because of the highway project, appellants were "deprived of the most important incidents of ownership, the rights to use and alienate property." *Id.* at 595, 547 P.2d at 288. *See also In re* Seattle, 81 Wn. 2d 652, 657, 504 P.2d 292, 295 (1972) (eminent domain proceeding in which court stated that valuable rights in land include not only possession, but rights to rent, to sell, and to improve); Ackerman v. Port of Seattle, 55 Wn. 2d 400, 348 P.2d 664 (1960), *discussed at* note 68 *infra*.

68. *See* Griggs v. Allegheny County, 369 U.S. 84 (1962) (airport use of airspace above plaintiff's land, making residential use of property difficult and interfering with plaintiff's health and peace of mind, was "taking" of property interest for which county must pay compensation). *See also* United States v. Causby, 328 U.S. 256 (1946). In Ackerman v. Port of Seattle, 55 Wn. 2d 400, 348 P.2d 664 (1960), the plaintiffs alleged that airport use of airspace above their unimproved vacant land decreased its value and constituted a taking of a property interest for which just compensation must be paid. The court agreed, holding that the property interest in a thing consists not merely of its ownership and possession, but of the unrestricted right of use, enjoyment, and disposal. Anything which destroys any of those elements to that extent destroys the property itself. *Id.* at 409, 348 P.2d at 669.

69. *See In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975) (*Spielman-Fond* established that restriction of power to alienate is not property interest protected by fourteenth amendment); First Recreation Corp. v. Amoroso, 26 Ariz. App. 477, 549 P.2d 257 (1976) (real property attachment constitutionally indistinguishable from mechanics' lien in *Spielman-Fond*); Bustel v. Bustel, 555 P.2d 722, 724 (Mont. 1976) (upholding state's summary real property attachment statute upon basis of *Spielman-Fond* and *Hansen* decisions and rejecting holdings in United States Gen., Inc. v. Arndt, 417 F. Supp. 1300 (E.D. Wis. 1976), and Terranova v. AVCO Financial Servs., Inc., 396 F. Supp. 1402 (D. Vt. 1975), *discussed at* note 73 *infra*, as "resting on gauzy and theoretical bases having little relevance to present day realities"). *See also* National Permanent Fed. Sav. & Loan Ass'n v. Virginia Concrete Co. (*In re* Thomas A. Cary, Inc.), 412 F. Supp. 667 (E.D. Va. 1976). *Spielman-Fond* has also been found controlling as applied to mechanics' liens. *See* Tucker Door & Trim Corp. v. Fifteenth Street Co., 235 Ga. 727, 221 S.E.2d 433 (1975) (holding summary mechanics' lien procedures constitutional under authority of *Spielman-Fond* and because lien statute

cantly several courts have rejected or ignored the *Spielman-Fond* reasoning and have concluded that real property attachment entails an invasion of property interests of the debtor that are entitled to constitutional protection. In *Roundhouse Construction Corp. v. Telesco Masons Supplies Co.*[70] and *Barry Properties, Inc. v. Fick Bros. Roofing Co.*[71] both the Connecticut and Maryland Supreme Courts rejected the reasoning of *Spielman-Fond* and held that imposition of a mechanics' lien without notice and a prior hearing or other procedural safeguards constitutes a taking of a significant property interest in violation of the due process clause of the state and federal constitutions. Each court expressly disagreed with the view that, absent a seizure of both use and physical possession, the restrictions imposed by the lien are de minimis. The *Barry Properties* court recognized that the lien makes sale or encumbrance of the property extremely difficult and diminishes the owner's equity to the extent of the lien.[72] Three federal district courts[73] and the California Supreme Court[74] have adopted the

serves important public interests); Morse v. Rentar Indus. Dev. Corp., 85 Misc. 2d 304, 379 N.Y.S.2d 994 (1976). *See also* Brook Hollow Assocs. v. J.E. Greene, Inc., 389 F. Supp. 1322 (D. Conn. 1975).

70. 168 Conn. 371, 362 A.2d 778, *vacated and remanded for determination of whether decision rests on independent state ground,* 423 U.S. 809 (1975), *reaffirmed on both state and federal grounds,* 365 A.2d 393 (Conn. 1976).

71. 277 Md. 15, 353 A.2d 222 (1976).

72. 353 A.2d at 228.

73. *See* United States Gen., Inc. v. Arndt, 417 F. Supp. 1300 (E.D. Wis. 1976); Terranova v. AVCO Financial Servs., Inc., 396 F. Supp. 1402 (D. Vt. 1975); Hutchison v. Bank of North Carolina, 392 F. Supp. 888 (M.D.N.C. 1975). All three courts simply ignored the decision in *Spielman-Fond.* The district court in *Arndt* held the Wisconsin statute constitutionally deficient for permitting the attachment of real property solely upon a conclusory supporting affidavit and without requiring adequate bond or providing the debtor with a sufficient opportunity to obtain immediate post-attachment relief from wrongful issuance of the writ. 417 F. Supp. at 1312–13. The district court in *Terranova* held Vermont's attachment statute unconstitutional under the due process clause as applied to real property, stating that an attachment of real estate curtails economically important property uses. 396 F. Supp. at 1407. In *Hutchison* the court concluded at the outset that the procedural requirements of due process are applicable to an attachment of real property. 392 F. Supp. at 894. The court upheld the statute, which allowed summary attachment of plaintiff's condominium, not because the attachment of real property does not infringe on a property interest, but because the statute contained the procedural safeguards held necessary in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). *See* note 89 *infra.*

74. Connolly Dev., Inc. v. Superior Court, 17 Cal. 3d 803, 533 P.2d 637, 132 Cal. Rptr. 477 (1976), *appeal dismissed,* 97 S. Ct. 778 (1977) (mem.). The court held that the filing of a mechanics' lien constitutes a "taking" of a constitutionally protected property interest. It favorably cited *Roundhouse* and *Barry Properties* while expressly disagreeing with the *Spielman-Fond* holding in this regard. *Id.* at 812–13, 553 P.2d at 642–44, 132 Cal. Rptr. at 482–83. Nevertheless, the court upheld California's mechanics' lien statute as not violative of the due process clause, noting that it actually provided more procedural safeguards than did the Arizona statute upheld in *Spielman-Fond.*

same reasoning. These courts have aligned themselves with the numerous pre-1974 decisions that the attachment of realty involves deprivation of a property interest cognizable under the fourteenth amendment.[75] Despite the holding in *Hansen v. Weyerhaeuser,* the Washington court should follow the reasoning of these courts, whose analysis reflects a better understanding of the nature and effects of real property attachment.[76]

III. THE INTERESTS BALANCED

A. The Constitutional Deficiency of the Attachment Statute

The *Hansen* court suggested that even if it had found a deprivation of a significant property interest, the Washington attachment statute would withstand a due process challenge. The court stated that the post-attachment hearing afforded the debtor compared favorably with the immediate postseizure hearing provided by the statute upheld in *Mitchell.*[77] The court did not elaborate on this observation. Nevertheless, this part of the note demonstrates that the Washington provision for a post-attachment hearing fails to meet the constitutional requisites expressed in *Mitchell* and subsequent cases.

The Supreme Court in *Mitchell* held that a statute authorizing prejudgment seizure of a debtor's property may contain adequate procedural safeguards which comport with due process requirements even though it does not mandate prior notice and a hearing. The Court sustained the constitutionality of a Louisiana statute which afforded the following procedural guarantees: (1) A requirement that the creditor allege specific facts in support of summary seizure; (2) judicial supervision of the writ-issuing process; (3) filing of a bond by the creditor;

75. *See, e.g.,* Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., 365 F. Supp. 1299 (D. Mass. 1973); Clement v. Four North State Street Corp., 360 F. Supp. 993 (D.N.H. 1973).

76. For a discussion of what the Washington court has stated with regard to this matter, see note 40 *supra.*

77. The court stated:

> Since the Louisiana sequestration statute in *Mitchell* entitled the debtor to an immediate hearing at which the creditor had the burden of justifying the issuance of the writ, the Court concluded that the challenged procedure comported with due process.
>
> Washington also provides for an early hearing at which the creditor is required to demonstrate that the writ was properly and regularly issued. See, RCW 7.12.270.

526 F.2d at 506–07.

and (4) the right of the debtor to an immediate postseizure hearing and to dissolution of the writ absent proof by the creditor of the probable validity of the merits of the underlying claim.[78] The Court clearly regarded the postseizure hearing essential to due process, as ensuring an early determination of error and enabling the debtor to minimize harmful consequences of a mistaken or arbitrary seizure.[79]

One year later in *Di-Chem,* the Court held unconstitutional a garnishment statute that lacked any procedural guarantees similar to those which had "saved" the sequestration statute in *Mitchell.*[80] The absence of an early postseizure hearing at which the creditor would be required to demonstrate the probable validity of his claim was cited by the Court as a significant defect in the statute.[81] Two lower federal courts have since held that a statutory post-attachment hearing which does not allow the merits of the creditor's claim to be put in issue fails to meet minimal due process requirements under *Mitchell.*[82]

The relevant Washington statutory provision, R.C.W. § 7.12.270, suffers from a similar constitutional defect. The post-attachment hearing does not reach the merits of the underlying claim. The debtor

78. 416 U.S. at 605–06.

79. The Court stated: "[T]he debtor may immediately have a full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor- or court-supervised possession." *Id.* at 610.

80. The Court stated that "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana statute." 419 U.S. at 607.

81. *Id.* The Court stated: "There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." Justice Powell, concurring, stated: "The most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing." *Id.* at 613.

82. *See* United States Gen., Inc. v. Arndt, 417 F. Supp. 1300 (E.D. Wis. 1976); Sugar v. Curtis Circulation Co., 383 F. Supp. 643 (S.D.N.Y. 1974), *rev'd on other grounds sub nom.* Carey v. Sugar, 425 U.S. 73 (1976). The court in *Arndt* wasted little time in pinpointing the deficiency:

> [T]he Wisconsin statute specifically precludes judicial consideration of a plaintiff's likelihood of success on the merits of the claim underlying the attachment . . . .
>
> Such an unequivocal elimination of consideration of the plaintiff's underlying claim on a challenge to the writ renders the process afforded therein deficient.

417 F. Supp. at 1313. In *Sugar* the district court had relied on early decisions by the New York courts that appeared to preclude an inquiry into the merits on a motion to dissolve an attachment. The Supreme Court reversed and remanded the case to the district court with directions to abstain from a decision on the federal constitutional issue until the parties had an opportunity to obtain a construction from the state courts of the prejudgment attachment statute. The Court noted that, although early case law agreed with the district court's conclusion, recent case law indicated that New York courts had considered a wide range of grounds, including fact issues going to the merits of the creditor's claim. Because the question of how the state courts would construe the statute was unclear, it was improper for a three-judge district court to address the question of the statute's constitutionality.

is authorized to seek dissolution of the attachment only upon grounds that it was improperly or irregularly issued. Neither an allegation by the debtor of the nonexistence of any legal indebtedness or of any contractual obligation, nor the introduction of any defense by way of counterclaim or setoff, constitutes a valid ground for dissolution of the writ.[83] Thus, the hearing tests only the capacity of the creditor to follow the procedures delineated in the statute, not the probable validity of the underlying debt. It does nothing to minimize the possibility of a wrongful attachment or use of the lien solely to gain leverage over the debtor. The statute does require the creditor to post a bond as security for any damages sustained by the debtor in the event of a wrongful attachment,[84] but it requires neither specific factual allegations in support of the writ nor judicial supervision of the writ-issuing process, both of which the *Mitchell* Court also considered to be critical guarantees. Contrary to the conclusion of the Ninth Circuit in *Hansen,* Washington's attachment statute fails to meet the constitu-

83. WASH. REV. CODE § 7.12.270 (1976) states:

> The defendant may at any time after he has appeared in the action and before he has given bond to the effect that he will perform the judgment of the court, as provided in RCW 7.12.250, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

"Improperly or irregularly issued" includes consideration of the ground under R.C.W. § 7.12.020 (1976) upon which the writ of attachment was issued. For example, in Hogue v. McAllister, 122 Wash. 347, 210 P. 671 (1922), the plaintiff brought suit on a claim attaching personal property of the defendant and alleging under R.C.W. § 7.12.020(7) that the defendant was preparing to convert his property into money to place it beyond the reach of his creditors. The defendant was able to controvert that allegation by affidavit in a post-attachment hearing, and the writ was dissolved.

This does not mean, however, that the defendant could attack the purported debt or present any defenses tending to show that the plaintiff would fail to prove his claim at the trial. For example, if the ground upon which the attachment was issued is R.C.W. § 7.12.020(10)—to recover on a contract express or implied—the defendant can introduce no evidence controverting that allegation since the existence of the contract necessarily goes to the merits of the plaintiff's claim, and evidence of the merits of the claim is not admissible under Washington case law. *See* McFarland v. Ratcliffe, 167 Wash. 673, 9 P.2d 1090 (1932); Market Operating Corp. v. Crull, 165 Wash. 306, 5 P.2d 340 (1931).

It should be noted, however, that this issue has not been before the Washington Supreme Court recently. Consequently, old case law may not be definitive, as was the case in Carey v. Sugar, 425 U.S. 73 (1976). *See* note 82 *supra.* Due process objections to the Washington post-attachment hearing would largely disappear should the court construe "improperly or irregularly issued" to include issues reaching the probable validity of the creditor's underlying claim.

84. *See* WASH. REV. CODE § 7.12.060 (1976). The creditor must post a bond for double the amount for which he demands judgment as security for damages in the event the defendant may prove that the attachment was "wrongfully, oppressively or maliciously sued out." *Id.*

tional requisites delineated in *Mitchell* and applied in subsequent cases.

B. A Need for the "Mitchell Model" in Real Property Attachment

The procedural guarantees sanctioned by the Court in *Mitchell,* if applied to real property attachment, would serve to give the process an enhanced measure of accuracy and reliability while preserving the interest of the creditor in the property attached.[85] A creditor seeking security in an attachment of real property will find his interests protected to some extent by the nature of the property itself. The chief concern of the Court in *Mitchell* was that the prior notice and hearing requirement of *Fuentes,*[86] as applied to personalty, would expose the creditor to a serious risk of loss through concealment, destruction, encumbrance, transfer, or depreciation of the property.[87] A creditor seeking to attach *real* property, however, faces significantly less risk that the property will be destroyed or undergo measurable depreciation. Nor can the property be concealed or removed from the jurisdiction. Moreover, in Washington, if a conveyance is fraudulent the creditor may still reach the property while in the hands of the grantee by attachment or an action to set aside the conveyance.[88]

85. The Court in *Mitchell* rejected the *Fuentes* rule that balancing is never appropriate as an initial matter and only applicable in the narrow realm of an "extraordinary situation." Some commentators, however, have concluded on the basis of *Mitchell* and *Di-Chem* that prior notice and an opportunity to be heard—the *Fuentes* requirements—are constitutionally required in the context of unsecured transactions and that the alternative procedures in *Mitchell* are available only to a creditor with a secured interest in the property seized. *See* Comment, *Justice White's Chemistry: The Mitchellization of* Fuentes, 50 WASH. L. REV. 901 (1975). Others have concluded that despite the apparent revitalization of *Fuentes* in *Di-Chem,* the former was and still is overruled by *Mitchell* insofar as it was inconsistent. Thus, the nature of the creditor's interest in the property is not determinative. *See* Pearson, *supra* note 40, at 277–78. The Supreme Court's decision in Carey v. Sugar, 425 U.S. 73 (1976), would appear to indicate support for this latter view. The Court remanded for reconsideration of the post-attachment hearing requirement although the creditor had no secured interest in the property attached. *See* note 82 *supra.*

86. *See* notes 25–26 and accompanying text *supra.*

87. 416 U.S. 608–10. For a critical analysis of the practical validity of Justice White's concern for the creditor's interests in *Mitchell,* see Pearson, *supra* note 26. For commentary challenging the efficacy of either the *Fuentes* or *Mitchell* due process requirements, see Scott, *supra* note 13.

88. WASH. REV. CODE § 19.40.090 (1976). To the extent that the grantee gives consideration and is without actual fraudulent intent, he is entitled to a lien or to retain the property as security for consideration paid. *Id.* § 19.40.090(3). *See* Masterson v. Ogden, 78 Wash. 644, 139 P. 654 (1914) (awarding plaintiff lien against property fraudulently transferred by her ex-husband to avoid payment of divorce settlement).

The *Mitchell* model further promotes the creditor's interest by allowing him to attach realty without prior notice to the debtor. The creditor retains fully the element of "surprise"; the debtor, not warned of any pending action, will have no opportunity to respond by placing the property beyond the creditor's reach.

Indeed, the principal function of the procedural guarantees of *Mitchell* is to ensure that unwarranted deprivation is kept to a minimum by holding the creditor accountable for his actions. Judicial supervision of the writ-issuing process adds nothing to the creditor's risk, nor does any requirement that the creditor allege the specific factual basis of his claim. An immediate post-attachment hearing at which the creditor must prove the probable validity of his claim operates to protect the debtor against mistaken attachment and minimize interference with his free use of the property. A creditor who cannot demonstrate the probable validity of his claim should not be entitled to utilize state resources to interfere with the debtor's use of his property.

To the extent that *Mitchell*—by requiring a bond, specific factual allegations, judicial supervision of the writ-issuing process, and an immediate postseizure hearing—would reduce the likelihood that the debtor would be deprived of the unfettered use of real property without justification, it is a decision that promotes the interests of the debtor that are entitled to constitutional protection.[89] If applied to real property attachment, these alternative procedures would serve to give attachment an enhanced measure of accuracy and reliability while preserving the interest of the creditor in the property attached. The Washington attachment statute should be amended to conform to these essential due process requirements.

IV. CONCLUSION

The decision of the Ninth Circuit in *Hansen v. Weyerhaeuser*

89. In Hutchison v. Bank of North Carolina, 392 F. Supp. 888 (M.D.N.C. 1975) the court used precisely this kind of flexible due process test under which the magnitude and probability of the harm to the debtor were balanced against the interests of the state in providing creditors with effective collection remedies. The overriding concern of the Court in *Mitchell*, the district court believed, was to consider the effectiveness of the challenged statute in minimizing the risk that the ex parte procedure would lead to a wrongful taking. The court concluded the procedural safeguards present in the North Carolina real property attachment statute, closely following those present

should not be followed in Washington. Its purported distinction between the attachment of real and personal property ignores the actual effects of the former by focusing on the form rather than on the substance of the deprivation. A court holding that real property attachment is within the ambit of due process protection would necessarily require a declaration that the Washington attachment statute is unconstitutional, as it fails to meet three of the four minimum standards set forth in *Mitchell.* It is strongly recommended that the Washington legislature move to amend the statute to conform to due process requirements. The statute has remained essentially unchanged since 1900. It has been declared unconstitutional as applied to personal property.[90] There exists a genuine need for a complete reworking of the statute to afford a clear guide to permissible procedures and grounds for attachment of real or personal property. Absent defined standards, neither creditors nor debtors have a definitive basis upon which to determine whether constitutionally adequate procedures have been followed. Furthermore, an attachment in violation of the debtor's due process rights may subject the creditor to liability for civil rights damages.[91] Appropriate legislation would provide consistency, delineate rights and remedies, and preserve the interest of the creditor in the attached property, while simultaneously protecting the interest of the debtor in preventing an erroneous or unwarranted taking.

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in the Louisiana sequestration statute in *Mitchell,* adequately protected both debtor and creditor interests.

90. *See* note 31 *supra.*

91. In Lynch v. Household Fin. Corp., 405 U.S. 538 (1975), the plaintiff brought a class action suit seeking declaratory and injunctive relief on the ground that class members' constitutional rights were impaired by the Connecticut prejudgment attachment and garnishment statutes, which did not provide prior notice and a hearing before seizure of the debtor's property. The district court had dismissed the action for lack of subject matter jurisdiction. The Supreme Court refused to distinguish between personal liberties and proprietary rights in an action seeking relief under 42 U.S.C. § 1983 (1970), stating:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel is, in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. . . . That rights in property are basic civil rights has long been recognized.

405 U.S. at 552.